Prometheus: Giving Life to Formal Retrospective Review Through "Thin Rationality" Judicial Review

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Conceived as a means to regularly prune outdated regulations from agency rulebooks, formal retrospective review is a procedural requirement for administrative agencies to review rules authorized under a given congressional statute on a regular basis. Yet reformed rules proposed under these statutory requirements are often challenged by interest groups and rescinded by courts, wasting agency resources to draft, promulgate, and defend. Ultimately, the high cost and general futility of conducting formal retrospective review inflates the number of rules in circulation, creates excessive compliance costs, leads to suboptimal use of agency resources, and makes possible the potential for arbitrary enforcement of outdated rules.

This Note examines formal retrospective review in light of the Federal Communications Commission's Media Ownership Quadrennial Review and now seventeen-year-old Prometheus Radio Project *litigation in United States Court of Appeals for the Third Circuit. It is the first scholarship to propose a formal "thin rationality" arbitrary and capricious standard of judicial review for static or deregulatory actions promulgated in the formal retrospective review process. By removing judicial tariffs on formal retrospective review, an official thin rationality standard of review would effectuate the will of Congress, as embodied by these statutory "lookback" requirements, and make formal retrospective review a viable tool for congressional oversight of agency rulemaking—all while working in harmony with the symbiotic Congress-administrative agency relationship.*

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I. INTRODUCTION

American rulemaking developed as a means to efficiently respond to the ever-changing needs of governance. Significantly expanded during the New Deal,[1] there has been less enthusiasm for federal rulemaking in the years since.[2] Yet anti-administrativists[3] have struggled to pare back rulemaking in the executive branch, even when politicians sympathetic to their cause head it.[4] And yet, although much has been made of President Trump's Executive Order No. 13,771, requiring that two regulations be eliminated for every new regulation issued,[5] then-President Obama's Executive Order 13,563 sought to "improve . . . the actual results of regulatory requirements" by requiring agencies to develop plans for "periodic[] review [of] existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed . . . ."[6] In short, there is a bipartisan desire

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[1] *See* CONG. RESEARCH SERV., R43056 COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 17 (Sept. 2019) ("The Federal Register Act created the *Federal Register* in 1935 in response to the increasing number of administrative actions, laws, and regulations associated with the New Deal.").

[2] Every president since the Carter administration has required agencies to reexamine existing regulations. Wendy Wagner, William West, Thomas McGarity, & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 185–86 (2017).

[3] "Anti-administrativists," according to Gillian Metzger, are generally those that "are strong on rhetorical criticism of administrative government out of proportion to their bottom-line results; they oppose administration and bureaucracy, but not greater presidential power; they advocate a greater role for the courts to defend individual liberty against the ever-expanding national state; and they regularly condemn contemporary national government for being at odds with the constitutional structure the Framers created . . . ." Gillian E. Metzger, *The Supreme Court, 2016 Term--Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017). *But see* Aaron L. Nielson, *Confessions of an "Anti-Administrativist"*, 131 HARV. L. REV. F. 1, 2–6 (2017).

[4] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (In dissent, then-Justice Rehnquist argued that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration") (footnote omitted).

[5] Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017), https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf [https://perma.cc/6MEZ-MFCM]; *see also* Keith B. Belton & John D. Graham, *Trump's Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803, 818 (2019) ("For the first time in history, the federal government has begun to count national acts of deregulation as well as acts of regulation and report their ratio each year to the public.").

[6] Exec. Order No. 13,563, 3 C.F.R. § 13,563 (2011), https://www.govinfo.gov/content/pkg/CFR-2012-title3-vol1/pdf/CFR-2012-title3-vol1-eo13563.pdf [https://perma.cc/M924-ZU35]; *see also* Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. ONLINE 57, 57–58 (2013) [hereinafter Coglianese, *Forward*] ("Responding

for both procedural government reform, generally,[7] and retrospective review reform, specifically.[8] Perhaps, then, the ends Americans seek are not necessarily *less* government, but more *efficient* government.[9]

In a hypothetical world of perfectly prudent governance, Congress would regularly reauthorize or retire agency rules itself, eliminating the need for agencies to decide which of their old rules are still appropriate.[10] But in reality, Congress is highly unlikely to revive its active, labor-intensive role as the primary federal legislative body at this time.[11] Instead, Congress has selectively tried a more passive approach to agency oversight—called formal retrospective review.[12] Formal retrospective review can take many different forms, but at its core, it is a statutory mandate from Congress that federal agencies review rules authorized under a given statute at yearly intervals set by Congress.[13] Under

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to an executive order from President Obama. . . . agencies have collectively completed more than five hundred regulatory reviews and initiated policy modifications expected to yield cost savings in the billions of dollars.").

[7] *See* Frank Newport, *Deconstructing Americans' View of Government as Top Problem*, GALLUP (Oct. 27, 2017), https://news.gallup.com/opinion/polling-matters/221072/deconstructing-americans-view-government-nation-top-problem.aspx [https://perma.cc/9BVS-8PSZ].

[8] *See* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 644 (2017) [hereinafter Walker, *Modernizing*].

[9] *Compare* Max Fisher, *Stephen K. Bannon's CPAC Comments, Annotated and Explained*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/us/politics/stephen-bannon-cpac-speech.html [https://perma.cc/D8E7-KLNG] (Bannon suggested President Trump's appointees "were selected for a reason": the "deconstruction of the administrative state"), *with CPAC, Panel with FCC Chair Ajit Pai*, C-SPAN (Feb. 23, 2018), https://www.c-span.org/video/?441473-17/cpac-panel-fcc-chair-ajit-pai&start=852 [https://perma.cc/L8Q4-GJ33] (discussion at 14:55–14:59, Chairman Pai stating that "[w]e created [the FCC's] Office of Economics and Analytics to make sure we had a [cost-benefit analysis disclosure] process in place").

[10] Indeed, while most doubt the ability of Congress to draft legislation, the adoption of reauthorization requirements would allow politically accountable representatives to vote on the rules affecting their constituents, mitigating the need to resolve such political questions by means of judicial review. *See generally* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020) (discussing the temporal complications of delegation).

[11] *See* Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1101–02 (2018) [hereinafter Walker, *Restoring*]. Between 2015 and 2016, federal agencies added roughly 175,000 pages of rules to the *Federal Register*, while Congress enacted just 329 public laws—3,036 pages in the *Statutes at Large*—over the same period. *Id.*

[12] *See, e.g.*, 5 U.S.C. § 610(c) (2012); Telecommunications Act of 1996, Pub. L. No. 104–104, § 202(h), 110 Stat. 56, 111–12 (1996).

[13] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 49 (July 2007), https://www.gao.gov/new.items/d07791.pdf [https://perma.cc/R34T-PDSZ]. Statutorily-required retrospective reviews are generally conducted between every two to ten years and have been undertaken at the Departments of Agriculture, Justice, Labor, and Transportation; the Environmental Protection Agency; the

formal retrospective review, agencies are statutorily required to "review [their] rules [every given number of years] . . . and . . . repeal or modify any regulation [the agency] determines to be no longer in the public interest."[14] But though these measures require frequent agency action,[15] they often produce little change[16] and create little-to-no benefit for the agency.[17] Thus, this Note will propose an interpretive or legislative change to the Administrative Procedure Act (APA) that could revive formal retrospective review as a viable means of Congressional oversight of agency rulemaking: refining the standard of judicial review for formal retrospective review actions[18] to allow for "thin rationality" arbitrary and capricious review[19] in cases involving static or deregulatory actions.

Generally, thin rationality arbitrary and capricious review involves a more deferential standard of review than is often used. Arising from the Supreme Court's decision in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*[20] (*Baltimore Gas*), the thin rationality line of precedent[21] exists

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Federal Communications Commission; the Federal Deposit Insurance Corporation; and the Small Business Administration, though almost all federal agencies have standards for conducting formal retrospective reviews. *Id.* at 2–3, 13–14.

[14] Telecommunications Act of 1996 § 202(h); *see also, e.g.*, 5 U.S.C. § 610(c) ("Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months.").

[15] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 6. For example, the U.S. Department of Agriculture's Agricultural Marketing Service conducted eleven mandatory formal retrospective reviews under 5 U.S.C. § 610 from 2001 to 2006, which resulted in zero regulatory changes. *Id.*

[16] *Id.*

[17] *See id.* at 7 ("Agencies and others reported multiple factors that impeded the conduct and usefulness of retrospective reviews. Agencies reported that the most critical barrier to their ability to conduct reviews was the difficulty in devoting the time and staff resources required for reviews while also carrying out other mission activities.").

[18] 5 U.S.C. § 706 (2012).

[19] *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1361 (2016). Thin rationality "emphasizes that agencies are constrained by limited resources, information, and time, and asks what (nonideal) reasons agencies may have for acting inaccurately, nonrationally, or arbitrarily in light of those limits." *Id.* While Gersen and Vermeule argue that thin rationality is already the norm in practice, they also note that the Supreme Court "displays a better understanding of uncertainty and its significance for administrative law than do the lower courts." *Id.* at 1391.

[20] Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103, 105–06 (1983).

[21] The precedent stemming from thin rationality "embodies an approach to rationality review that is more aware of, and tolerant of, the inescapable limits of rationality when agencies make decisions under uncertainty." Gersen & Vermeule, *supra* note 19, at 1359. Notably within this line of precedent is Chief Justice Roberts's Opinion for the Court in *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019). Though even within that opinion, there is a noticeable shift between this more deferential standard and hard look review. *See* Christopher J. Walker, *What the Census Case Means for Administrative Law:*

under the "arbitrary and capricious" standard in parallel to the oft-cited "hard look" review of *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[22] (*State Farm*) and its progeny.[23] Under this Note's proposal, *Baltimore Gas*'s thin rationality standard would apply when agencies take formal retrospective review actions that either (1) remove or (2) do not change the legal burden on the public from existing rules. This would leave the hard look arbitrary and capricious standard untouched for formal retrospective review actions that imposed new burdens on the public.[24]

In Part II, this Note briefly summarizes the administrative state's evolving role in American governance, with a focus on the New Deal reforms of the 1930s. Part III builds on this outline by examining formal retrospective review through the FCC's Media Ownership Quadrennial Review and its Prometheus Radio Project litigation in United States Court of Appeals for the Third Circuit. Part IV first explains the historical basis for thin rationality arbitrary and capricious review, from *Baltimore Gas* onward, and proposes that thin rationality standard apply to judicial review of static or deregulatory formal retrospective review actions. Part IV then explains the prudence of thin rationality in formal retrospective review and analyzes the balancing of regulation reliance interests against agency statutory adherence.

II. ADMINISTRATIVE RETROSPECTIVE: FROM THE NEW DEAL TO THE QUADRENNIAL MEDIA OWNERSHIP REVIEW

In the wake of the Great Depression, Americans elected Franklin Delano Roosevelt President to take a different approach to fighting America's plight:

Harder Look Review?, YALE J. ON REG. NOTICE & COMMENT (June 27, 2019), https://www.yalejreg.com/nc/what-the-census-case-means-for-administrative-law-harder-look-review/ [https://perma.cc/LF7E-87GD].

[22] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 41, 52 (1983).

[23] Indeed, "[w]hile '*State Farm*' as symbol is not the law, there is nothing in *State Farm* itself that is incompatible with [thin rationality review]." Gersen & Vermeule, *supra* note 19, at 1361. And because the deferential opinion in *Baltimore Gas* was decided during the same term as *State Farm*, "[p]lausibly, rather than living in the era of hard look review or the *State Farm* era, we live in the era of *Baltimore Gas*." *Id.* at 1359.

[24] While retrospective review focuses largely on reducing regulatory burdens, then-President Obama's Executive Order 13,563 explicitly allowed for regulatory expansion if retrospective analysis supported it. Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 598 (2014) [hereinafter Sunstein, *Lookback*].

technocracy.[25] Informed by prior legislative failures,[26] he promoted central planning by disinterested experts as a means of more effectively combatting the Great Depression.[27] As President, he carried out the mandates his four electoral victories[28] provided by expanding the executive branch[29] and establishing agencies with newfound authority to oversee economic production through price controls and greater regulatory authority.[30]

Newly created agencies, such as the National Recovery Administration and the Agricultural Adjustment Administration, were tasked with extensive oversight of their sectors of expertise.[31] Another newly created agency with extensive oversight power, the Federal Communications Commission, was created "for the purpose of securing a more effective execution of [telecommunications] policy by centralizing authority . . . and granting . . . authority with respect to interstate and foreign commerce in wire

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[25] *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 393. For an explanation of the divide between technocratic and democratic values in administrative law, see Cass R. Sunstein, *From Technocrat to Democrat*, 128 HARV. L. REV. 488, 489 (2014) ("Technocrats are enthusiastic about a large role for insulated, independent experts, immersed in complex questions. Democrats are worried that such experts lack accountability and may have an agenda of their own.").

[26] *See* Chantal Thomas, Essay, *Challenges for Democracy and Trade: The Case of the United States*, 41 HARV. J. ON LEGIS. 1, 5–6 (2004) ("[T]he Smoot-Hawley Act serves as a stinging reminder of the depths of error to which legislatures are susceptible when in the throes of minority economic interests.").

[27] "[National recovery from the Great Depression] can be helped *by the unifying of relief activities* which today are often scattered, uneconomical, and unequal. It can be helped *by national planning for and supervision of* all forms of transportation and of communications and other utilities which have a definitely public character . . . . We must act and act quickly." President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933) (transcript available at https://avalon.law.yale.edu/20th_century/froos1.asp [https://perma.cc/CFP3-8XKP]) (emphasis added).

[28] *Franklin D. Roosevelt*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/franklin-d-roosevelt/ [https://perma.cc/9QEY-4925].

[29] John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 206, 210–11 (2018).

[30] *See, e.g.*, Mariano-Florentino Cuéllar, Foreword, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1393–94 (2014) (discussing the similarities between the statutes at issue in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Yakus v. United States*, 321 U.S. 414 (1944), and noting that "a different complement of Justices in *Yakus*," consisting of a greater number of President Roosevelt's appointees, "cited a mix of administrative logic and wartime exigency to make a case for broad delegation"). It is worth noting here that although federal agencies were significantly expanded during the Franklin Roosevelt administration, their existence does not wholly originate from the New Deal. Agencies have been part of the American Constitutional system since the founding era. *See* Bernard Schwartz, *Administrative Law in the Next Century*, 39 OHIO ST. L.J. 805, 806 (1978); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 615 (1989).

[31] *See, e.g.*, Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255, 256 (1982).

and radio communication . . . ."[32] Bringing together presidential control, bureaucratic oversight, expertise, and structural insulation was designed to promote prudent governance through a more effective exercise of executive power.[33]

Despite fierce disagreements among the Supreme Court and the general public, the extended popularity of President Roosevelt and his New Deal allowed for the reformation of American government in his technocratic image.[34] Any lingering disagreements over the administrative state's expanded constitutional role were eventually settled with the codification of the Administrative Procedure Act of 1946.[35] In order to legitimize the undemocratic nature of rulemaking,[36] the APA requires agencies to explain their actions under an arbitrary and capricious standard.[37] This standard applies to any form of regulatory action,[38] with an exception only for insignificant changes not affecting policy.[39]

As evidenced by the shift from legislation to regulation as the primary form of lawmaking, the American public has largely accepted the administrative state.[40] And as a result, the APA has taken on a quasi-constitutional role in modern lawmaking.[41] But Congress has amended the APA only sixteen times since its enactment, effectively leaving twenty-first century rulemaking in the compromised procedures of 1946.[42] Ironically, American rulemaking exists to support the government's need to quickly respond to societal changes,[43] yet the

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[32] 47 U.S.C. § 151 (2012).

[33] Metzger, *supra* note 3, at 78.

[34] *See id.* at 52–57 (detailing early 1930s anti-administrativists opposed to the New Deal's expansion of the administrative state and noting that "after FDR had appointed seven new Justices[,] constitutional limits to economic regulation and national administration had largely disappeared").

[35] *See generally* 5 U.S.C. §§ 551–59, 701–06 (2012) (the APA as currently codified).

[36] *See, e.g.*, Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 198 (1983) [hereinafter Sunstein, *Deregulation*].

[37] *See* Shapiro & Levy, *supra* note 25, at 440.

[38] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 41 (1983) (holding that the APA has "no difference in the scope of judicial review depending upon the nature of the agency's action").

[39] *See* Wagner et al., *supra* note 2, at 198 (citing 5 U.S.C. § 553(b)(3)(B) (2012)).

[40] *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1000 (2015).

[41] *See* Richard W. Murphy, *The Limits of Legislative Control over the "Hard-Look"*, 56 ADMIN. L. REV. 1125, 1125 (2004) (discussing the difficulty of revising the APA, given its "general applicability across the massive administrative state and quasi-constitutional status").

[42] Walker, *Modernizing*, *supra* note 8, at 630–31.

[43] *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938) ("[T]he administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems. It represents a striving to adapt governmental technique that still divides under three rubrics, to modern needs and, at the same time, to preserve those

process for making those adjustments has not evolved itself[44]—and technological advances continue apace, overrunning past rulemaking justifications.[45] As FCC Commissioner Brendan Carr has noted, regulations are easier for agencies to create than to substantively reform;[46] this can be attributed in part to *State Farm*'s hard look arbitrary and capricious review.[47] And no matter whether a result of agency capture, political factors, or simply neglect, stale rule preservation risks converting rules from a means of prudent governance into artificial barriers to market entry.[48]

III. *PROMETHEUS RADIO PROJECT V. FCC*: A SAGA IN FOUR PARTS (THUS FAR)

According to Greek myth, the Titan Prometheus stole fire from the gods and gave it to humanity.[49] As retribution, Zeus chained Prometheus to Mount Caucasus and sent an eagle every day to tear out Prometheus's liver, only to have the liver regenerate each night and be torn out again the following day.[50]

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elements of responsibility and those conditions of balance that have distinguished Anglo-American government.").

[44] *Cf.* Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, 67 ADMIN. L. REV. 629, 644 (2015) (noting that "the current EU regulatory framework was substantially reworked in the Treaty of Lisbon in 2009 and continues to evolve" and contains "numerous features that contrast favorably with the American approach").

[45] *Compare* Press Release, Ajit Pai, Chairman, FCC, Chairman Pai Statement on the Third Circuit's Media Ownership Decision (Sept. 23, 2019), https://docs.fcc.gov/public/attachments/DOC-359794A1.pdf [https://perma.cc/E5PM-KTCG] [hereinafter Chairman Pai Statement] (citing "newspapers going out of business, broadcast radio struggling, broadcast TV facing stiffer competition than ever" as reasons to reform existing media ownership rules), *with* Sunstein, *Lookback*, *supra* note 24, at 591 ("When agencies issue rules, they have to speculate about benefits and costs. After rules are in place, they should test those speculations, and they should use what they learn when revisiting a regulation or issuing a new one.").

[46] *Q&A Session with FCC Commissioner Brendan Carr*, FEDSOC EVENTS (July 10, 2019) (on file with the *Ohio State Law Journal*) (discussion at minutes 2:30–6:00, 23:00–24:00).

[47] *See* Sunstein, *Lookback*, *supra* note 24, at 599 ("Whether or not [the APA, judicial review, or OIRA's procedural] safeguards are excessive, optimal, or insufficient, *they do ensure that the regulatory lookback is not as expeditious as many would like*. Rules may be excessive or unjustified, but in most cases, their simplification and repeal requires use of a time-consuming process.") (emphasis added).

[48] *See, e.g.*, Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 881 (1973); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 279 (1986) [hereinafter Sunstein, *Factions*]. For analysis of the rent-seeking behavior that can emerge from artificial scarcity, see Robert D. Tollison, *Rent-Seeking: A Survey*, 35 KYKLOS 575, 577–79 (1982).

[49] *Contexts -- Myths -- Prometheus*, UNIV. PENNSYLVANIA, http://knarf.english.upenn.edu/Contexts/prometh.html [https://perma.cc/8QWX-R4P8].

[50] *Id.*

This ancient myth's endless cycle of pain reflects the modern tragedy of formal retrospective review, as shown by the litigation that shares this ancient Titan's name.

Under formal retrospective review, Congress mandates that agencies take a retrospective "lookback" at their existing rules, forcing agencies to regularly justify those rules' existence.[51] One of those instances is the FCC's formal review of media ownership rules (Quadrennial Review).[52] In the latest edition of the Quadrennial Review, the FCC sought to update its rules governing the media marketplace by adjusting its media ownership regulations,[53] but the Third Circuit Court of Appeals blocked those changes, holding them to be arbitrary and capricious.[54] This decision was just the latest[55] in an ongoing regulatory saga with profound implications for the media landscape—especially the viability of traditional media outlets, such as newspapers—going forward.[56] This Part examines the extended back-and-forth of the ongoing *Prometheus Radio Project v. FCC* litigation at the Third Circuit Court of Appeals, stemming from the FCC's quadrennial media ownership formal retrospective review.

A. *Creating the Quadrennial Media Ownership Review*

Created as part of the Telecommunications Act of 1996, the Quadrennial Review requires the FCC to "determine whether any of such [broadcast

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[51] *See* Wagner et al., *supra* note 2, at 188.

[52] Telecommunications Act of 1996, Pub. L. No. 104–104, § 202(h), 110 Stat. 56, 111–12 (1996). The 2004 amendment transformed the biennial review requirement into a quadrennial review requirement. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, § 629, 118 Stat. 3, 99–100 (2004).

[53] *See* Prometheus Radio Project (*Prometheus IV*) v. FCC, 939 F.3d 567, 572 (3d Cir. 2019), *cert. granted*, No. 19–1231, 2020 WL 5847134 (U.S. Oct. 2, 2020).

[54] *Id.* at 573, 577.

[55] *Id.* at 572.

[56] *Compare* Nan Whaley & Michael Copps, *The* Dayton Daily News *Is About to Shrink. The FCC Shouldn't Have Allowed It: Dayton Mayor*, USA TODAY (Jan. 2, 2020), https://www.usatoday.com/story/opinion/2020/01/02/facilitation-fcc-dayton-daily-news-shrink-column/2742642001/ [https://perma.cc/K36P-GBGU] ("As the mayor of Dayton and a former FCC commissioner, we are coming together to share our concern about [media consolidation]. The FCC's deal with Apollo [Global Management] allows the private equity firm to own a significant amount of media. History has shown that the quality of news and information has greatly diminished under private equity control."), *with* In the Matter of 2014 Quadrennial Regulatory Review, 31 FCC Rcd. 9864, 10,048 (2016) (Dissenting Statement of Comm'r Pai) ("The National Association of Broadcasters has pointed to no fewer than 15 studies demonstrating that newspaper-television cross-ownership increases the quantity and/or quality of news broadcast by cross-owned television stations. . . . In Dayton, for example: Cox Media Group's cross-ownership of the *Dayton Daily News* and CBS affiliate WHIO-TV helped to uncover one of the most prominent stories of [2014]: the mismanagement of the Department of Veterans Affairs. . . . [T]reatment delays would not have come to light had it not been for the dogged efforts of *both* the newspaper and television reporters, working together.") (citation omitted).

ownership] rules are necessary in the public interest as the result of competition [and to] repeal or modify any regulation it determines to be no longer in the public interest."[57] In theory, the purpose of this formal retrospective review process is to minimize unnecessary regulation and promote prudent government in times of change.[58] But in current practice, formal retrospective review drains agency resources[59] and invites near-constant litigation from both anti- and pro-rule parties.[60] Congress's well-intentioned actions have thus resulted in seemingly never-ending policy battles, ultimately decided by courts—and rarely decided in time for the next review cycle.[61] In fact, Congress originally made the FCC's regular media ownership review a biennial requirement under the Telecommunications Act of 1996,[62] but, in a telling move, relaxed the requirement to its current quadrennial format in 2004.[63]

Many have claimed the proper interpretation of the acronym "FCC" is "from crisis to crisis."[64] And in regard to the Quadrennial Review, the expression fits, as the agency has taken on lawsuits left[65] and right.[66] One of the more prolific litigants in these media ownership challenges is Prometheus Radio Project (Prometheus). In challenging the FCC's revised rules in 2004 (*Prometheus I*),[67] 2011 (*Prometheus II*),[68] 2016 (*Prometheus III*),[69] and 2019 (*Prometheus IV*),[70] Prometheus's persistent lawsuits have vindicated the claim that intrusive judicial review of rules can either "trap[] [agencies] in an indefinite cycle of reversal, as the court overturns every new agency attempt to make a policy choice, or . . . incentiv[ize] [agencies] to engage in a charade, in

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[57] Telecommunications Act of 1996, Pub. L. No. 104–104, § 202(h), 110 Stat. 56, 111–12 (1996).

[58] The primary disruptor in this rapidly changing market has been the growing ubiquity of the internet. *See Prometheus IV*, 939 F.3d at 590 (Scirica, J., concurring in part and dissenting in part).

[59] Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733, 764 (2018) [hereinafter Coglianese, *Improving*].

[60] *See Prometheus IV*, 939 F.3d at 573.

[61] *Id.* at 574.

[62] Telecommunications Act of 1996 § 202(h).

[63] Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, § 629, 118 Stat. 3, 99 (2004).

[64] *See, e.g.*, Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 679 (2009).

[65] *E.g.*, *Prometheus IV*, 939 F.3d at 573.

[66] *E.g.*, Fox Television Stations, Inc. v. FCC, 293 F.3d 537, 538 (D.C. Cir. 2002).

[67] *See generally* Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372 (3d Cir. 2004) (subsequent history omitted).

[68] *See generally* Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431 (3d Cir. 2011) (subsequent history omitted).

[69] *See generally* Prometheus Radio Project v. FCC (*Prometheus III*), 824 F.3d 33 (3d Cir. 2016) (subsequent history omitted).

[70] *See generally Prometheus IV*, 939 F.3d 567.

which they offer the reviewing court bogus first-order reasons to prefer one alternative over the other."[71]

B. Prometheus I: *2004*

This litigation began when the FCC conducted its 2002 review of media ownership rules. It established a working group, which in October 2002 released for public comment twelve studies of the media marketplace.[72] Two million people voiced their opposition to any relaxation of rules via postcards, emails, letters, and petitions, but the FCC, based upon the findings of the twelve studies, relaxed its media ownership rules in June 2003.[73]

1. *The Rules Challenged*

Prometheus sued to prevent the deregulation, which included media cross-ownership reform (repealing the newspaper/broadcast cross-ownership rule[74] and radio/television cross-ownership rule[75] and instituting a single Cross-Media Limits rule to regulate ownership[76]), local television ownership reform,[77] and local radio ownership reform.[78] Notably, the high-profile national television ownership rule was not reviewed in *Prometheus I*, as it had been mooted by

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[71] Gersen & Vermeule, *supra* note 19, at 1387.

[72] *Prometheus I*, 373 F.3d at 386.

[73] *Id.*; Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U. L. REV. 645, 646 (2004).

[74] The newspaper/broadcast cross-ownership rule prohibits one entity from owning of a television broadcast station and a daily newspaper in the same market. 47 C.F.R. § 73.3555(d) (2003); *Prometheus I*, 373 F.3d at 397.

[75] The radio/television cross-ownership rule regulates the number of television and radio stations that may be owned by a single entity, with limits that vary based on the size of the market. 47 C.F.R. § 73.3555(c) (2003); *Prometheus I*, 373 F.3d at 387.

[76] The proposed Cross-Media Limits rule varied the level of regulation based on the size of the Designated Market Area (DMA). In small DMAs, newspaper/broadcast combinations and radio/television combinations were prohibited. In medium-sized DMAs, one entity could own either a newspaper and either one television station and up to 50% of the radio stations that could be commonly owned under the local radio rule, or up to 100% of the radio stations allowed under the local radio rule. In large DMAs, common ownership among newspapers and broadcast stations was unrestricted. *Prometheus I*, 373 F.3d at 387–88.

[77] *See id.* at 412 (the ability to own multiple television stations in a local market—here allowing triopolies in markets of eighteen stations or more and duopolies in other markets).

[78] *See id.* at 421 (the ability to own multiple commercial radio stations in a local market—here retaining existing numerical limits but changing the method for determining market size).

Congress,[79] who, during the public pushback, enacted a statutory cap on its own.[80]

2. *The Standard of Review*

The Third Circuit explicitly followed precedent for hard look review by restating that when "an agency . . . departs from its 'former views[,]' [it] is 'obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.'"[81] Indeed, the court went so far as to say that although the APA standard of review is more deferential where the issues are elusive and not easily defined, "a 'rationality' standard [was still] appropriate" in this case.[82]

3. *The Decision*

The Third Circuit first remanded the cross-ownership reform for not providing "a reasoned analysis to support the limits that it chose."[83] Specifically, a majority of the three-judge panel held that when the FCC adapted the Herfindahl-Hirschmann Index[84] into its own "Diversity Index" to measure local market diversity, it "gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results."[85] The majority then remanded the local television ownership rule's numerical limit provision (requiring the FCC "to harmonize certain inconsistencies and better support its assumptions and rationale")[86] and its expanded waiver provision (requiring the FCC to either "reconsider or justify its decision to expand the . . . provision").[87] Finally, the majority remanded the local radio ownership rule for arbitrarily and capriciously retaining numerical limits.[88] In short, the Third Circuit found that the FCC failed to synchronize its new ownership limits with the "'elusive' concept of diversity," despite its

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[79] *See id.* at 396 (the number of television stations a single entity may own on a national basis).

[80] Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, § 629, 118 Stat. 3, 99 (2004).

[81] *Prometheus I*, 373 F.3d at 389–90 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 41, 41–42 (1983)).

[82] *Id.* at 390.

[83] *Id.* at 397.

[84] An antitrust formula used by the Department of Justice and Federal Trade Commission. *See id.* at 402–03.

[85] *Id.*

[86] *Id.* at 412.

[87] *Prometheus I*, 373 F.3d at 412.

[88] *Id.* at 421.

twelve commissioned studies[89] and "the inherent uncertainty regarding the prospective effects of structural rules."[90]

C. Prometheus II: *2011*

Prometheus and the FCC returned for the first time in 2011, to argue about the 2006 Quadrennial Review.[91] After *Prometheus I*, the FCC had largely returned all of the media ownership rules in the Quadrennial Review to their pre-*Prometheus I* form.[92] Having effectively returned to the status quo—and with the FCC being in the middle of the 2010 Quadrennial Review at the time the case was heard—the court remanded only the newspaper/broadcast cross-ownership rule on procedural grounds[93] and the FCC's definition of "eligible entity,"[94] with instructions for the FCC to make its changes during the then-ongoing 2010 retrospective review.[95]

D. Prometheus III: *2016*

However, because *Prometheus II* was ongoing, the FCC did not complete its 2010 Quadrennial Review on time.[96] In an attempt to reconcile its time limitations with its statutory duty, the FCC decided to combine its 2010 Quadrennial Review with its 2014 Quadrennial Review—but even that spilled over the four-year cycle deadline.[97] Thus, the parties returned once more to court, in 2016's *Prometheus III*.[98] The third time was not a charm for the FCC, as the court held that the agency had "unreasonably delayed action on its definition of an 'eligible entity' . . . and [the court] remand[ed] with an order for it to act promptly."[99] In highlighting the agency's neglect of its statutory duty, the court remarked that "[a]lthough courts owe deference to agencies, we also

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[89] *Id.* at 436, 446 (Scirica, C.J., dissenting in part, concurring in part).

[90] *See id.* at 436 (Scirica, C.J., dissenting in part, concurring in part) (citing FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 796–97 (1978)).

[91] Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 437 (3d Cir. 2011) (subsequent history omitted).

[92] *See id.* at 440–42.

[93] Here remanding for procedural issues stemming from inadequate public notice of the proposed rule. *Id.* at 450, 453–54.

[94] *Id.* at 469–70. "Eligible entities" are those organizations eligible for FCC diversity programs designed to promote media ownership among certain groups. *See id.* Here, the FCC used a revenue-based definition to avoid potential constitutional issues, but the court held that the Commission insufficiently considered a non-revenue-based definition. *Id.* at 469.

[95] *See id.* at 453–54.

[96] *See* In the Matter of 2014 Quadrennial Regulatory Review, 31 FCC Rcd. 9864, 9865 (2016).

[97] Prometheus Radio Project v. FCC (*Prometheus III*), 824 F.3d 33, 37 (3d Cir. 2016) (subsequent history omitted).

[98] *Id.* at 38–39.

[99] *Id.* at 37.

recognize that, '[a]t some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.'"[100]

E. Prometheus IV: *2019*

And predictably, that was not enough. In 2019, the regulator and regulatee made their latest appearance at the Third Circuit: *Prometheus IV*.[101] To be brief, Prometheus once more challenged the FCC's definition of an "eligible entity" for FCC diversity programs, this time as defined in 2017.[102] Prometheus again argued that, in considering the proposed rule, the FCC "fail[ed] to compile a record sufficient to consider its impact on ownership diversity and adopt[ed] a definition of 'eligible entities' that will not increase ownership diversity—despite the Commission's stated intention to do so."[103]

In reaching its decision, the Third Circuit majority referenced *State Farm*'s hard look standard three times[104] and dismissed the lack of an empirical evidence requirement in the text of the APA, holding that the FCC needed to commission studies itself.[105] The members of the three-judge panel (the same panel from *Prometheus I*) were all well aware that the FCC "ha[d] been busy" since this litigation began in 2004,[106] but the agency had little to show for its efforts.[107] After repudiating the FCC's data and dismissing the claim that "ownership diversity is just one of many competing policy goals [the FCC] must balance when adjusting its regulations,"[108] the court held in favor of Prometheus once more, vacating and remanding the rule—this time for "woefully simplistic" support, generally,[109] and failing to conduct studies on gender diversity, specifically.[110]

The Third Circuit panel once more retained jurisdiction over the remanded issues, remarking that "further litigation is, at this point, sadly foreseeable."[111] However, rather than settle for a *Prometheus V* with the same three-judge panel,

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[100] *Id.* (citing Pub. Citizen Health Research Grp. v. Chao, 314 F.3d 143, 158 (3d Cir. 2002)).

[101] *See generally* Prometheus Radio Project (*Prometheus IV*) v. FCC, 939 F.3d 567 (3d Cir. 2019), *cert. granted*, No. 19–1231, 2020 WL 5847134 (U.S. Oct. 2, 2020).

[102] Petition for Review at 2, 4, Prometheus Radio Project v. FCC, 939 F.3d 567 (3rd Cir. 2019) (No. 18-1092).

[103] *Id.* at 4.

[104] *See Prometheus IV*, 939 F.3d at 577, 585, 587.

[105] *See id.* at 587 (citing Stilwell v. Office of Thrift Supervision, 569 F.3d 514, 519 (D.C. Cir. 2009)) ("It is true that '[t]he APA imposes no general obligation on agencies to produce empirical evidence,' only [that agencies] 'justify [their] rule[s] with . . . reasoned explanation[s].'").

[106] *Id.* at 572–73.

[107] *See id.* at 589 (Scirica, J., concurring in part and dissenting in part).

[108] *Id.* at 586.

[109] *Id.* at 586–87.

[110] *See Prometheus IV*, 939 F.3d at 584–86.

[111] *Id.* at 572, 589.

the FCC filed for (but was denied) *en banc* review at the Third Circuit[112]—and has since been granted *certiorari* at the Supreme Court of the United States.[113] Thus, at the time of this writing, this now seventeen-year-old formal retrospective review persists.

IV. FORMAL PROSPECTIVE REFORM: "THIN RATIONALITY" ARBITRARY AND CAPRICIOUS REVIEW FOR FORMAL RETROSPECTIVE REVIEW

In order to overcome bottlenecks in the formal retrospective review process, courts should clarify what constitutes an arbitrary and capricious action in the context of formal retrospective review.[114] Alternatively, but perhaps less likely, Congress could formally amend the APA to explicitly establish a distinct standard of review for formal retrospective review.[115] Either option would result in the creation of an official thin rationality standard for static or deregulatory actions stemming from formal retrospective review.

Thin rationality review is a standard of review that recognizes "that rationality review should calibrate [agencies' obligation to justify their decision-making] with sensitivity to the risk that genuine reasons are sometimes incommunicable between experts and generalists."[116] Thus, this standard of review would more explicitly adopt a presumption of agency rationality in static or deregulatory formal retrospective review actions—only undoing "*unreasoned* agency action."[117] In the case(s) of *Prometheus*, this standard would have ended this now seventeen-year back-and-forth in 2004, saving valuable FCC and Third Circuit resources.[118] And going forward, this sophistication would extend President Roosevelt's achievement of prudent technocratic governance well into the new millennium.[119]

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[112] *See* Jon Reid, *FCC Seeks More Time for High Court Media Ownership Appeal*, BLOOMBERG L. (Feb. 12, 2020), https://news.bloomberglaw.com/tech-and-telecom-law/fcc-seeks-more-time-for-high-court-media-ownership-appeal [https://perma.cc/KV9M-P6M7].

[113] *See* FCC v. Prometheus Radio Project, No. 19–1231, 2020 WL 5847134 (U.S. Oct. 2, 2020).

[114] As noted by Kristin E. Hickman and David Hahn, common law standards of review are often altered by courts "through iterative clarification rather than replacement." Kristin E. Hickman & David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611, 655 (2020).

[115] *See* Coglianese, *Forward*, *supra* note 6, at 60.

[116] Gersen & Vermeule, *supra* note 19, at 1357. While Gersen and Vermeule see thin rationality as the rule, not the exception, at the Supreme Court level, they also note that "[c]urrent law is actually a mixed bag" at the lower levels of the federal judiciary, an indication that a Supreme Court clarification or statutory command may be beneficial, especially in cases like *Prometheus*. *Id.* at 1358.

[117] *See id.* at 1358. Thin rationality only excludes "genuinely ungrounded agency decisionmaking, in the sense that the agency cannot justify its action even as a response to the limits of reason." *Id.*

[118] *See* Coglianese, *Improving*, *supra* note 59, at 764.

[119] *Cf.* Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 253 (2009) [hereinafter Seidenfeld, *Agencies*]

A. *When Agencies Use Expertise to Promote Liberty in Deregulatory Actions, Searching Judicial Scrutiny Is Unnecessary and Inefficient*

The primary reason for Congress's creation of and reliance upon agencies is expertise.[120] Like courts, Congress largely consists of generalists who lack the resources to extensively study every issue.[121] In this sense, agencies exist to "fill up the details" that Congress could not have foreseen.[122] Indeed, one of the harbingers of the Franklin Roosevelt administration, and its expansion of agencies' role in federal governance, was Congress enacting the Smoot-Hawley Tariff[123]—exacerbating the Great Depression and helping lead to President Roosevelt's election in 1932.[124]

As a result of this reliance, practical (some would even say inevitable)[125] deference principles[126] emerged to allow agency expertise to maneuver day-to-day management issues.[127] However, a lack of political accountability—one of the virtues of administrative government[128]—is also one of its vices.[129] To democratize this tradeoff, Congress required agencies to explain their actions in court under the APA's arbitrary and capricious standard.[130] Although the Court

("[A]dministrative law[,] including doctrines of judicial review[,] should be structured to encourage agency action when it is justified and discourage it otherwise.").

120 *See* Sunstein, *Factions*, *supra* note 48, at 281.

121 *See, e.g.*, Kevin Werbach, *Higher Standards Regulation in the Network Age*, 23 HARV. J. L. & TECH. 179, 192 (2009).

122 Wayman v. Southard, 23 U.S. 1, 43 (1825); *see also* Gundy v. United States, 139 S. Ct. 2116, 2135–41 (2019) (Gorsuch, J., dissenting) (explaining the role for and judicial review of federal agencies).

123 *See generally* Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. § 1301-1683(g) (2018)); *The Senate Passes the Smoot-Hawley Tariff*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Senate_Passes_Smoot_Hawley_Tariff.htm [https://perma.cc/2Q2P-C5VM].

124 *See* Nancy Williams, Note, *The Resilience of Protectionism in U.S. Trade Policy*, 99 B.U. L. REV. 683, 688, 702–03 (2019) (describing President Franklin Roosevelt's opposition to tariffs and the disastrous consequences of Congress passing, against the advice of economists, the Smoot-Hawley Act in 1930).

125 *See generally* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017) (arguing that deference is the natural consequence of congressional reliance on agencies to resolve major policy issues).

126 *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."); *see also* Hickman & Hahn, *supra* note 114, at 66–68 (discussing *Chevron*'s original conception as reinforcing the deferential judicial attitude when analyzing agencies' interpretations of statutes).

127 *See* Seidenfeld, *Agencies*, *supra* note 119, at 251.

128 *See* Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2097 (2005).

129 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 498 (2010) (citing THE FEDERALIST NO. 70, at 476 (J. Cooke ed. 1961) (A. Hamilton)).

130 *E.g.*, Shapiro & Levy, *supra* note 25, at 440.

articulated this standard differently in *State Farm* and *Baltimore Gas*,[131] the APA itself does not textually require agencies to examine all possibilities or to ground all actions in hard data.[132] Yet in practice, many lower court judges (and academics[133]) have acted as though it imposes an obligation on agencies to consider all policy alternatives and to persuade with their reasoning in court.[134] This hard look judicial gloss is not always unreasonable.[135] As Chief Justice Roberts explained, "[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise."[136] Yet must judicial review require such hard look safeguards in

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[131] *See, e.g.*, Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 728, 737–59 (2014) (explaining courts' first- and second-order grounds for hard look review and noting that "[s]ince its adoption of hard look review, the Court has used relatively consistent language to describe its approach to reviewing agency policy decisions, but has in fact applied the concept of arbitrariness differently in a wide range of cases") (footnote omitted). *Compare* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 41, 52 (1983) (citation omitted) ("Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions. . . . [T]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'"), *with* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103, 105 (1983) ("It is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made.") (citations omitted).

[132] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978) (quoting Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 29 (1961)); *see also* Sunstein, *Deregulation*, *supra* note 36, at 210 ("The APA provides no clear authorization for the hard-look doctrine . . . .").

[133] *See, e.g.*, Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 485 (1997) [hereinafter Seidenfeld, *Deossification*].

[134] *See, e.g.*, Gersen & Vermeule, *supra* note 19, at 1389 ("[A]lthough both *State Farm* and successor cases explicitly repudiate the idea that agencies must consider all feasible policy alternatives, many judges act as though there is such an obligation, often without quite saying so.") (footnote omitted); *see also* Sunstein, *Deregulation*, *supra* note 36, at 209 (suggesting that the distinction between skeptics of active courts and hard look advocates was a "belief in a more objective public interest").

[135] *See* Murphy, *supra* note 41, at 1135 ("[O]ne might expect courts to respond to the increased risk of arbitrariness inherent in greater agency power by reviewing its exercise more closely, and one might think of the hard-look gloss on the arbitrary-and-capricious test as manifesting this impulse."); *see also* Sunstein, *Deregulation*, *supra* note 36, at 183–84 ("The [hard look] doctrine is sometimes characterized as an exercise of federal common-law authority . . . ."); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013) (arguing that there is extensive, unwritten administrative common law).

[136] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019). Although the agency action in this case (colloquially known as the "Census Case") was eventually

deregulatory or static formal retrospective review actions? There are a number of reasons why it may not.

1. *Conflation of Type I and Type II Errors*

In administrative law, the information asymmetry between generalists and specialists presents potential for Type I and Type II errors.[137] As Alexander Hamilton recognized, the constitutional duty of an independent judiciary is to be a "bulwark[] of a limited constitution against legislative encroachments [curtailing the rights of the public]."[138] Therefore courts in pro-regulatory actions have a duty to favor Type I errors over Type II, as this strategy protects individuals' liberty from undemocratic agencies acting with the binding power of the federal government.[139] As Professors Vermeule and Gersen have recognized, this is essentially the Blackstone principle: it is better to let ten guilty persons go free than to convict one innocent person.[140] Applying this reasoning to the administrative law context, it is better to invalidate ten rational agency actions than to allow one irrational action. Thus, the common law "judicial gloss" of hard look arbitrary and capricious review[141] is not without merit—and scholars are justified in questioning Congress's ability to take away such scrutiny in pro-regulatory actions.[142]

But in a deregulatory context, separation of powers justifications for extratextual judicial review are less clear. To be sure, the Supreme Court has held, in *State Farm*, that "[r]evocation constitutes a reversal of the agency's former views as to the proper course. . . . 'There is, then, at least a presumption

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remanded on pretextual grounds, in reviewing the agency's exercise of discretion, the Chief Justice cited *Baltimore Gas*. *Id.* at 2569 (quoting Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105 (1983)).

[137] *See* Gersen & Vermeule, *supra* note 19, at 1357–58, 1398 ("The Type I error is judicial failure to recognize tacit expertise when it does exist, resulting in erroneous invalidation of agency action; the Type II error is to defer[] to nonexistent tacit expertise, resulting in erroneous validation of agency action.").

[138] THE FEDERALIST NO. 78, at 431 (Alexander Hamilton) (P.F. Collier ed., 1901); *see also* Murphy, *supra* note 41, at 1127 ("[T]he rule of law requires that judicial review provide some minimum amount of protection against arbitrary agency action . . . ."). *But see* Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. (forthcoming 2020) (manuscript at 65) (on file with the *Ohio State Law Journal*) (describing more demanding judicial review of agency oversteps, but not understeps, such as non-enforcement and deregulation, as "put[ting the judiciary's] thumb on the scale against government action").

[139] *See* United States v. Morgan, 307 U.S. 183, 197 (1939) (citing Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co., 249 U.S. 134, 146 (1919)) ("It is a power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.'").

[140] Gersen & Vermeule, *supra* note 19, at 1395.

[141] *See* Seidenfeld, *Deossification*, *supra* note 133, at 490–92.

[142] *See generally* Murphy, *supra* note 41 (looking at the difficulty of eliminating hard look review).

that those policies will be carried out best if the settled rule is adhered to.'"[143] Yet agencies do not further bind the public in revocation or static actions. Far from it, they liberate the public or do not affect its legal status at all.[144] Neither Prometheus nor any other media organization can be in violation of an FCC revocation action.

Thus, in revocation actions, the greater concern is not that courts will erroneously allow nonexistent agency expertise to rationalize an agency action (a Type II error), but that courts will erroneously strike down an agency's rational, yet unsubstantiated, deregulatory action (a Type I error).[145] Yet with a single standard of review for both burden-imposing and burden-repealing actions, the APA's identical language, as currently interpreted, invites courts to conflate their extratextual[146] constitutional duty for scrutinizing judicial review in defense of liberty (which is appropriate when agencies *create* legally binding rules) with the bare "thin rationality" arbitrary and capricious statutory requirement (which is sufficient when *retaining* or *repealing* legally binding rules).[147] As a result, this uniformity inadvertently encourages courts to make intrusive Type I errors in both pro-regulatory and deregulatory actions—which encumbers agencies' tacit expertise[148] and prudent retrospective review.[149]

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[143] Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co, 463 U.S. 29, 41–42 (1983) (citing Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807–08 (1973)).

[144] *Cf.* Stephen G. Wood, Don C. Fletcher & Richard F. Holley, *Regulation, Deregulation and Re-Regulation: An American Perspective*, 1987 BYU L. REV. 381, 411 ("[I]f the FCC is able to obtain the same results under deregulation as were achieved under comprehensive regulation, then deregulation should be considered a success.").

[145] *Compare* Walters, *supra* note 138, at 24, 42 (describing the judicial review of the FCC's deregulatory net neutrality actions as a potential Type II error, and later noting that the costs of a pro-deference perspective "are justified by the policy benefits of allowing agencies to structure their enforcement programs and allocate resources as they see fit . . ."), *with* Chairman Pai Statement, *supra* note 45 ("[F]or the last fifteen years, a majority of the same Third Circuit panel has . . . block[ed] any attempt to modernize [ownership] regulations to match the obvious realities of the modern media marketplace.").

[146] *See* Sunstein, *Deregulation*, *supra* note 36, at 210 ("The APA provides no clear authorization for the hard-look doctrine . . . .").

[147] *See* Gersen & Vermeule, *supra* note 19, at 1356 ("Courts have sometimes adopted an excessively intrusive approach because, acting in the best of faith, they have misunderstood what rationality requires."); *cf.* Sunstein, *Factions*, *supra* note 48, at 280 (noting that not all agency actions should be treated equally).

[148] *See* Gersen & Vermeule, *supra* note 19, at 1357.

[149] *Cf.* Sunstein, *Lookback*, *supra* note 24, at 599 ("It is ironic but true that the procedural safeguards that are built into the fabric of administrative law, designed to discipline the rulemaking process, create significant barriers to the project of simplification and indeed to the regulatory lookback.").

2. *Scarce, Difficult to Quantify, or Unobtainable Data*

Moreover, the formal retrospective review problem is exacerbated by the fact that communicable data—especially in deregulatory actions—can be scarce, hard to quantify, or even unobtainable entirely. Even in pro-regulatory contexts, over 40% of major regulations at independent agencies include no information on anticipated costs or benefits.[150] That is not to say that such information does not exist (or even that those 40% of major regulations are therefore irrational),[151] but that "a reviewing court must remember that [an agency] is making predictions, within its area of special expertise, at the frontiers of science."[152] As a result, there can be a difficulty in acquiring such a quantification of data,[153] due to prohibitive costs, fundamental uncertainties in the rulemaking, or simply insuperable estimates.[154] Indeed, when President Reagan issued his groundbreaking Executive Order 12,291, which initiated the requirement of cost-benefit analysis for economically significant rules, he recognized then that some costs and benefits would be difficult to quantify.[155]

Working in concert with this dynamic, thin rationality review acknowledges "that limits of time, information, and resources may give agencies good second-order reasons to act inaccurately, nonrationally, or arbitrarily, in a first-order sense."[156] In other words, it can be rational to be irrational when predicting how to quadrennially harmonize regulation and the market—and vice versa.[157] Incentivizing deregulating agencies to dilute their expertise into arbitrary tangibility is not just irrational, it is bad governance.[158] Justice Scalia exasperated it best: "It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that

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[150] *See* Coglianese, *Improving*, *supra* note 59, at 735.

[151] *Cf.* Gersen & Vermeule, *supra* note 19, at 1376 ("[Q]uantified CBA is a specialized, sectarian decision-procedure, not a requirement of rational decision[-]making.").

[152] Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983); *cf.* Bridget C.E. Dooling, *Bespoke Regulatory Review*, 81 OHIO ST. L.J. 673, 675 (2020) (noting "the increasing influence of regulatory analysis techniques like cost-benefit analysis on judicial review of agency rulemaking, especially over the last two decades").

[153] *Cf.* Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 472 (3d Cir. 2011) (subsequent history omitted) ("We recognize that there are significant challenges involved in meeting [the diversity] goal . . . .").

[154] *See* Coglianese, *Improving*, *supra* note 59, at 743, 752.

[155] *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); *see also* Gersen & Vermeule, *supra* note 19, at 1376 ("Quantified CBA is both disputable and widely disputed.").

[156] Gersen & Vermeule, *supra* note 19, at 1402.

[157] *See id.* at 1384 ("[R]equir[ing] an agency to justify its decision using the exact information that is inevitably lacking is the very opposite of rationality.").

[158] *Cf. id.* at 1398 ("Unable to convey the real, albeit tacit, grounds for decision to the reviewers at acceptable cost, agencies will tend to substitute articulable reasons for their real reasons. The articulable reasons will fit the agency's behavior less well than the true, tacit grounds of decision . . . .").

can readily be obtained. . . . It is something else to insist upon obtaining the unobtainable."[159] After all, how does one quantify and rationalize liberty?

To be sure, this is not to say that deregulating agencies should not have to communicate their rationales. But by creating a de facto presumption in favor of their expertise when it comes to static or deregulatory formal retrospective review, thin rationality review can "calibrate that obligation [to communicate rationales] with sensitivity to the risk that genuine reasons are sometimes incommunicable between experts and generalists, or at least costly to communicate."[160] At the end of the day, courts and Congress must recognize that "[agency] communication itself has a strictly derivative and incidental value; it is a strictly evidentiary mechanism, one that helps courts or other reviewers to flush out illicit agency motivations by comparing the agency's actions to its stated rationales."[161] And while an agency must "set forth [its reasoning] so that the reviewing court may understand the basis of the agency's action and so [the court] may judge the consistency of that action with the agency's mandate,"[162] courts must have the humility to accept that perfect clarity to judge such actions cannot always exist.[163] In fact, expert agencies inevitably operate at some level beyond the comprehension of the generalists in the other branches—because that is the nature of the relationship between laymen and experts.[164]

3. *Difficulty Satisfying the Amorphous, Political "Public Interest" Standard*

And sometimes, experts must operate beyond *any* tangible comprehension. In the case of the Quadrennial Review, "no matter what the Commission decides to do to any particular rule—retain, repeal, or modify (whether to make more or less stringent)—it must do so in the *public interest* and support its decision with a reasoned analysis."[165] Yet in interpreting its highly malleable "public interest" obligation, the FCC will *have* to base some of its decision-making on what could be described as arbitrary and capricious grounds—because these decisions are fundamentally policy judgments.[166] Simply put, just deciding whether "public

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[159] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009).

[160] Gersen & Vermeule, *supra* note 19, at 1357.

[161] *Id.* at 1396.

[162] Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973).

[163] *See, e.g.*, Seidenfeld, *Deossification*, *supra* note 133, at 504 ("Often there are no data that prove the effectiveness or feasibility of a standard directly.").

[164] *Cf.* Gersen & Vermeule, *supra* note 19, at 1396 ("In many fields, experts have tacit knowledge that they cannot communicate, at least at acceptable cost, to generalist observers or other nonexperts.").

[165] Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372, 395 (3d Cir. 2004) (emphasis added) (subsequent history omitted).

[166] *See id.* at 435 (Scirica, C.J., dissenting in part, concurring in part) (supporting the idea that such decisions by an agency are policy judgments).

interest" means a public trustee relationship (as it did for the FCC's precursor, the Federal Radio Commission), deregulation (as it did in the 1980s), or any of the definitions used in between[167] will inevitably require the agency to choose amongst equally arbitrary options.[168] Making those difficult policy judgments is why Ajit Pai, not the Third Circuit, chairs the FCC.[169]

Rather than continuing judicial dissonance, thin rationality review would require courts to embrace regulatory humility[170] and consistently recognize the tacit knowledge of agencies.[171] If an obtuse court ultimately decides to set aside an agency's action in the name of amorphous statutory requirements, that court then has ample opportunity to effectively substitute its own policy judgment for that of the agency and of Congress.[172] And in so doing, the court will have wasted the agency's limited resources used to draft, promulgate, and defend the

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[167] *See, e.g.*, Mary M. Underwood, Notes and Comments, *On Media Consolidation, the Public Interest, and Notice and Agency Consideration of Comments*, 60 ADMIN. L. REV. 185, 196 (2008).

[168] *Cf.* Gersen & Vermeule, *supra* note 19, at 1386–87 ("The hallmark of such cases is *mirror-image reversibility*: the agency's choice of A over B is arbitrary, in the sense that the agency can give no valid first-order reason for the choice, but it is equally true that the agency can give no valid reason for the opposite choice either. . . . [A]ny choice [the agency] makes would fail ordinary arbitrariness review.").

[169] *Cf.* FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) ("[T]he Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference."); Schwartz, *supra* note 30, at 807 (noting that "public interest" is a "touchstone" in administrative law and that economic power must be subject to the public interest "*as defined by the administrator*") (emphasis added).

[170] *Compare* Maureen K. Ohlhausen, Comm'r, FTC, Regulatory Humility in Practice: Remarks by FTC Commissioner Maureen K. Ohlhausen 3–5 (Apr. 1, 2015) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/635811/150401 aeihumilitypractice.pdf) (describing regulatory humility as "recognizing the inherent limitations of regulation and acting in accordance with those limits" and arguing that because "[a]gencies have limited resources," they "should generally spend those resources to stop existing or extremely likely harms rather than trying to prevent speculative or unsubstantial harms"), *with* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 286–90 (1989) (Wilson provides examples of "well-intentioned court decision[s] having unintended and unwanted consequences" and notes that "like all human institutions, courts are not universal problem solvers competent to manage any difficulty or resolve any dispute. There are certain things courts are good at and some things they are not so good at . . . .").

[171] *See* Gersen & Vermeule, *supra* note 19, at 1396.

[172] *Compare id.* at 1373 ("As to any reasonably complex policy problem, an indefinitely large number of policy factors are potentially relevant, or can be claimed to be relevant by litigants who benefit from delaying agency action. Generalist judges who attempt to sift the wheat from the chaff will run every risk of becoming confused, absent explicit statutory guidance, and will inevitably end up making *de facto* policy choices . . . ."), *with* Prometheus Radio Project v. FCC (*Prometheus I*),, 373 F.3d 372, 435 (3d Cir. 2004) (Scirica, C.J., dissenting in part, concurring in part) ("[T]he [Third Circuit] has substituted its own policy judgment for that of the [FCC] and upset the ongoing review of broadcast media regulation mandated by Congress in the Telecommunications Act of 1996.") (subsequent history omitted).

rule.[173] Meanwhile, the public will have suffered uncertainty, before ultimately losing out on administrative agencies' most valuable asset: expertise.[174]

To be sure, if Congress issues a statutory mandate, an agency is bound to uphold that obligation, even under thin rationality review.[175] Indeed, some agencies have rightfully not modified or eliminated some of their rules during formal retrospective reviews because "some regulations are aligned so closely with specific statutory provisions."[176] But, as with most interactions between the administrative state and Congress, ambiguity in delegation indicates that the specific means of enacting policy are to be determined by agencies.[177] While courts may question the FCC's relative inaction, a hands-off media ownership approach may be justified: in this case, to allow an industry staggering from disruption the freedom to regain its footing.[178] If removing regulatory barriers to entry are, in agencies' expert opinions, the best way to serve the public interest, courts are unjustified in constantly remanding agencies' actions.[179] The idea of a rising tide lifting all boats may be difficult to quantify and explain[180]—

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[173] *See* Seidenfeld, *Agencies*, *supra* note 119, at 321.

[174] *See* Gersen & Vermeule, *supra* note 19, at 1387 ("If the court *itself* picks arbitrarily, substituting its own decision for the agency's, there is by hypothesis no added benefit whatsoever, but there is the extra cost of the judicial proceeding itself, including not only the out-of-pocket costs but also the delay in reaching some choice or other.").

[175] *See id.* at 1373; Sunstein, *Deregulation*, *supra* note 36, at 204–05 (noting that all agency action "must be reviewed to ensure that it conforms to the governing statute and that it is not arbitrary").

[176] *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 43.

[177] *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[178] *See Ownership Limits in an Increasingly Competitive Audio Marketplace: Is Now the Time For a New Tune?*, FEDSOC EVENTS (July 10, 2019) (on file with the *Ohio State Law Journal*) (discussion at 18:00–20:00 stating that "if you want the money to come to . . . minorities and women, so they can buy stations, have it be a stronger industry. Because right now, it doesn't matter who you are, you're having a very, very difficult time raising capital").

[179] *Cf.* Gregory Bradshaw Foote, Note, *Judicial Review of Rescission of Rules: A "Passive Restraint" on Deregulation*, 53 GEO. WASH. L. REV. 252, 256 (1984) (footnote omitted) ("The greatest degree of judicial deference to an agency's decision is appropriate for rules promulgated under broad 'public interest' statutes . . . These statutes typically embody only a minimal amount of normative judgment by the legislature, which instructs the administrative agency to regulate its subject area 'in the public interest.'").

[180] *Compare* Zahr K. Said, *Craft Beer and the Rising Tide Effect: An Empirical Study of Sharing and Collaboration Among Seattle's Craft Breweries*, 23 LEWIS & CLARK L. REV. 355, 359, 403–08 (2019) (analyzing the Seattle craft brewing industry's cooperative ethos, which confounds the standard theory of competitive markets, "with special focus on the ways in which collaboration can foster innovation and progress, even among direct competitors"), *with* Katie McAuliffe, *The FCC Should Modernize by Reducing Cross-Ownership Rules*, HILL (Sept. 25, 2017), https://thehill.com/opinion/technology/352244-the-fcc-should-modernize-by-reducing-cross-ownership-rules [https://perma.cc/XD88-XFY2] ("Outlets that have been allowed to pool resources have produced meaningful investigative coverage[,] like when the *Dayton Daily News* and Dayton, Ohio CBS affiliate WHIO-TV worked

but it can be in the public interest nonetheless.[181] And if such inaction is truly a Type II error,[182] Congress, prompted by its outraged constituents, always has the authority to narrow agencies' discretion—as they did in 2004.[183]

4. *Skeptical Courts Would Be More Consistent in Using Nondelegation Analysis*

But again, the open-ended dynamic between agencies and Congress exists so that Congress and the public can take advantage of agencies' expertise;[184] if courts want to question such leeway, nondelegation arguments would be a more conceptually consistent method.[185] To argue that agencies may not act in a deregulatory manner because such manner is not intuitive to generalist courts undermines the symbiotic relationship between agencies, Congress, and the judiciary—one that is foundational in the rulemaking context.[186] And conversely, perhaps anti-administrative jurists would be less apt to scrutinize broad delegations if they knew pro-regulatory actions could be more easily undone[187]—or simply changed[188]—in the future.

B. *Thin Rationality in Deregulatory or Static Formal Retrospective Review Actions Incentivizes Agencies to Use Their Resources More Efficiently*

Under the current system, deregulatory review inefficiencies are compounded by recurring formal retrospective review requirements.[189] While congressional mandates like the FCC's Quadrennial Review force agencies to

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together to expose mismanagement in the Department of Veterans Affairs. Though both news organizations are owned by Cox Media Group, the quality of the journalism did not decrease, it increased. Further regulatory reductions would support more of this high-quality reporting.").

[181] Underwood, *supra* note 167, at 197.

[182] *See* Gersen & Vermeule, *supra* note 19, at 1398 ("[T]he Type II error is to deferring to nonexistent tacit expertise, resulting in erroneous validation of agency action.").

[183] *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, § 629, 118 Stat. 3, 99 (2004); Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372, 396 (3d Cir. 2004) (subsequent history omitted).

[184] *See* Murphy, *supra* note 41, at 1131.

[185] *Cf. id.* at 1135–36 ("[W]ere judges successfully forced to give up heightened rationality review, they might become less tolerant of broad delegations and more inclined to strike them as unconstitutional or at least narrow them as a matter of constitutional avoidance.").

[186] *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[187] The tradeoff between the level of scrutiny and the level of allowable delegation may indicate the pair are judicial substitutes. *See* Murphy, *supra* note 41, at 1128. Were courts to be "[d]epriv[ed] . . . of the former . . . over time, they may tighten the latter." *Id.*

[188] *See* Bull, *supra* note 44, at 652–53.

[189] *See* Wagner et al., *supra* note 2, at 185–86.

look back at their old rules, agencies largely already do this on their own, in what is called *informal* retrospective review.[190] This "informal process . . . has important advantages over formal requirements that agencies review all or some significant portion of their regulations."[191] This is because "[i]nsofar as [formal] requirements are taken seriously, they impose a very substantial burden on agency staff."[192] In short, under the current system, generalists micromanaging how specialists allocate their time, via drawn-out formal retrospective review, can crowd out informal retrospective review from agencies' agendas.[193] That is not to say that formal retrospective review cannot be an effective—and perhaps necessary[194]—congressional oversight tool[195] going forward, but as it is currently implemented, the formal retrospective review process would likely not survive a cost-benefit analysis of its own.[196] Reform could streamline this process for both agencies and courts—and incentivize Congress into taking greater responsibility for the state of the *Code of Federal Regulations*.[197] What is more, agenda setting by Congress or the White House, while still micromanaging to a certain extent, can have a beneficial effect on setting agency priorities.[198]

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[190] *See id.* at 236 ("[C]ase studies suggest that post-promulgation policy changes . . . are common and perhaps even the norm for important rules.").

[191] *Id.* at 243.

[192] *Id.*; *see also* GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 7 ("Agencies reported that the most critical barrier to their ability to conduct reviews was the difficulty in devoting the time and staff resources required for reviews while also carrying out other mission activities.").

[193] *See* Wagner et al., *supra* note 2, at 258.

[194] Making formal retrospective review feasible could result in a new congressional oversight tool that acts as de facto legislative action, thus balancing Congress's need for regular activity, as a means of agency oversight, with its limited resources. *Cf.* Walker, *Restoring*, *supra* note 11, at 1120 (noting that "[w]ithout the threat of legislative action . . . the efficacy of [Congress's oversight] toolbox in influencing agency action is severely diminished").

[195] *See id.* at 1107 (describing various "tools" Congress has at its disposal to oversee federal agencies).

[196] *See supra* Part III.

[197] *Cf.* Walker, *Restoring*, *supra* note 11, at 1101–02 (noting that over 2015 and 2016, federal agencies added roughly 175,000 pages of rules to the *Federal Register*, while Congress enacted just 329 public laws—3,036 pages in the *Statutes at Large*—over the same period).

[198] *See* Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265, 282 (2015) ("[P]rioritization is a crucial element to any scheme of retrospective review."); Sunstein, *Lookback*, *supra* note 24, at 593 ("A number of officials, at a wide range of agencies, had long wanted to engage in an [retrospective review] initiative . . . but time is limited and officials have to set priorities. Now the President himself had directed them to act.").

Either through Congress or the courts, eliminating judicial tariffs would lower the cost of refining outdated rules for the experts that know them best.[199] And by requiring courts to conduct thin rationality review, Congress will incentivize the undemocratic administrative state to refine its existing rules via both formal and informal retrospective review.[200] In fact, by "deossifying"[201] this process, agencies looking to maximize their limited resources would want to repeal excessive rules, so that they do not have to spend resources enforcing and, if the rule is part of formal retrospective review, re-justifying it.[202] Thus, while agencies would be obligated to carry out their statutory mandates—and would still want to carry out such mandates in order to receive future congressional funding and avoid congressional retribution[203]—their desire not to waste resources on unnecessary rules would shift agencies' equilibrium action away from stasis and toward the optimal level of regulation.[204] This freeing up of resources would, in effect, reward agencies for keeping their rulebooks lean, so that taxpayer funding can be put towards its most productive use.[205]

In practice, courts can insert their own judgment into agency disputes when they tell agencies just how much they may reform.[206] As a result, in revocation actions, agencies are left trying to effectively prove that the rule in question is a clear and convincing net negative for society and that the aims of the authorizing statute will still be achieved if the rule is revoked and there is no replacement.[207] This is a high bar, requiring substantial agency resources—even for rules where

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[199] *Cf.* Seidenfeld, *Agencies*, *supra* note 119, at 301 ("[Judicial review] raises the cost of an agency changing policy or, in other words, it raises the price that the agency faces for action. This price rise will discourage agency action overall.").

[200] *See* Wagner et al., *supra* note 2, at 257–58.

[201] *See* Seidenfeld, *Deossification*, *supra* note 133, at 483 ("'[O]ssification' refers to the inefficiencies that plague regulatory programs because of analytic hurdles that agencies must clear in order to adopt new rules.").

[202] *See* FCC, FCC 00-346, BIENNIAL REGULATORY REVIEW 2000: STAFF REPORT 3 (2000); Wagner et al., *supra* note 2, at 246.

[203] *See* Walker, *Restoring*, *supra* note 11, at 1107–15.

[204] *See* Seidenfeld, *Agencies*, *supra* note 119, at 303 ("[D]ifferent procedural requirements not only impose different costs, they also provide different incentives for those within the agency to advocate agency action, and thereby can affect agency propensities toward action."); *cf.* Belton & Graham, *supra* note 5, at 825–29 (explaining regulatory budgeting, which forces an agency to prioritize regulatory costs, based on the amount of non-federal money the agency forces regulatees to spend through its rules).

[205] *See* Shapiro & Levy, *supra* note 25, at 393 (noting administrative agencies were a pragmatic development to respond to "the social needs of the time").

[206] *See* Gersen & Vermeule, *supra* note 19, at 1387.

[207] *Cf.* Randolph J. May & Seth L. Cooper, *A Proposal for Improving the FCC's Regulatory Reviews*, 12 PERSP. FROM FSF SCHOLARS 1, 4 (2017) (proposing a rule that "[a]bsent clear and convincing evidence to the contrary, the [FCC] shall presume that regulations under review are no longer necessary in the public interest" in order to facilitate retrospective review).

there is little debate about non-value.[208] But if cost does not deter agencies from attempting to reform rules, arbitrary interpretations of ambiguous statutory instructions can frustrate them instead.[209]

Courts may believe that they can play the role of philosopher–Goldilocks: choosing the amount of regulation that is just right—but that is not the role a generalist plays in the administrative system.[210] Thus, it is only rational for agencies to avoid this indefinite retrospective review when they can.[211] Put another way, as Daniel Boorstin, the former Librarian of Congress, said: "The greatest obstacle to progress is not ignorance but the illusion of knowledge."[212] By limiting courts in deregulatory formal retrospective review actions, Congress can limit judicial activism[213] and encourage efficient government—all without changing its current agency-dependent nature. If anything, in giving agencies the leeway to regularly refine their regulatory role as they see best, based on their limited resources,[214] Congress could relieve itself of the need to evaluate or reauthorize agencies actions at all—which, if nothing else, makes this proposal politically viable.

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[208] *See* Prometheus Radio Project v. FCC (*Prometheus IV*), 939 F.3d 567, 589 (3d Cir. 2019) (Scirica, J., concurring in part and dissenting in part) ("Studies in the record reinforce what most people old enough to recall the days before WiFi and iPads understand instinctively: the explosion of Internet sources has accompanied the decline of reliance on traditional media."), *cert. granted*, No. 19–1231, 2020 WL 5847134 (U.S. Oct. 2, 2020).

[209] *See supra* Part IV.A.3.

[210] *Cf.* Sunstein, *Deregulation*, *supra* note 36, at 188 (footnote omitted) ("It is important to be realistic about the limitations of judicial remedies . . . . The notion that, under current conditions, rights of participation and initiation can produce a kind of Habermasian 'ideal speech situation' is wildly romantic. There is, moreover, the familiar risks that judicial remedies will be based on a skewed understanding of a complex regulatory scheme or serve the preferences of the judges rather than promote genuine public interests.").

[211] *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 52 ("[F]rom the cursory information that agencies reported for some mandatory reviews that have review periods as long as 10 years, it appears that agencies may devote limited time and resources to conducting these reviews . . . ."). *See generally* In the Matter of 2014 Quadrennial Regulatory Review, 31 FCC Rcd. 9864 (2016) (the FCC's Report and Order combining the 2010 and 2014 Quadrennial Reviews into one review).

[212] Brent Orrell, *Embracing Radical Uncertainty*, L. & LIBR. (Oct. 31, 2019), https://www.lawliberty.org/2019/10/31/embracing-radical-uncertainty-blastland-review/ [https://perma.cc/BPD4-QW73].

[213] *Cf.* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

[214] *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 7.

C. *The Statutory Will of Congress Outweighs Regulatory Reliance Interests*

The difficulty of contemporary regulatory reform is further complicated by entrenched interests opposed to deregulation.[215] Because administrative law decisions must be based upon a public record, the interests most unreceptive to agency action have incentive to pile unfavorable studies and comments onto the record.[216] Agencies must then refute these additions in order to deregulate under hard look review—no matter how illogical the assertions may be.[217] In rulemakings that propose to repeal rules, such contributions to the record may be fatal, as refuting all defenses of a rule is a substantively difficult and resource-consuming task.[218]

Put another way, prioritizing reliance interests over liberty creates a "first-mover . . . advantage" that incentivizes agencies to regulate first, so that they may speak last on an issue.[219] And since *State Farm*'s hard look review prioritizes tangible decision-making above all else,[220] courts can afford to be especially skeptical of revocation actions, as there is no replacement for the to-be-repealed rule. After all, as the logic goes, "[t]hrowing out [a rule] when it has worked and is continuing to work . . . is like throwing away [regulatees'] umbrella in a rainstorm because [they] are not getting wet."[221]

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[215] *See, e.g.*, Wagner et al., *supra* note 2, at 243.

[216] *See* Sunstein, *Lookback*, *supra* note 24, at 585 ("Without a doubt, those with an incentive to oppose rules will tend to overstate the costs and perhaps even claim that if rules are finalized, terrible dislocations will occur.").

[217] *See, e.g.*, Murphy, *supra* note 41, at 1134 ("Numerous scholars . . . have contended that this [refutation] requirement imposes a crushing burden on rulemaking efforts by agencies which, in their vain efforts to document the rationality of their decisionmaking processes, must try to predict and answer every objection that some random, perhaps politically hostile, reviewing court might deem plausible.").

[218] *See id.* at 1134–35.

[219] *See, e.g.*, Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1639 (2019). *But cf.* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."). For example, in reviewing cost-benefit analysis (CBA), "courts are more deferential to the first CBA than the next CBA, which can be compared against the first." Cecot, *supra*, at 1639. This is problematic because a "judicial review asymmetry arguably works against deregulation because a deregulatory action is almost always a change from a prior regulatory status quo." *Id.*; *cf. supra* Part IV.A.1.

[220] Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co, 463 U.S. 29, 42 (1983) ("If Congress established a presumption from which judicial review should start, that presumption . . . is not *against* safety regulation, but *against* changes in current policy that *are not justified by the rulemaking record*.") (third emphasis added).

[221] Shelby Cty. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

Yet this logic, while natural,[222] implicitly assumes that the weather will not change—that there are no sunny days ahead. In the case of formal retrospective review, this mindset keeps excess regulation on the books and wastes agencies' resources on fruitless recurring reviews.[223] That is time lost that an agency cannot get back. This Part examines the argument against thin rationality arbitrary and capricious review and explains why regulatees placing substantial reliance interests upon rules that are subject to formal retrospective review is misguided.

1. *Reliance Interests for Public Law Regulatory Entitlements Require Courts to Give Exceptional Weight to Statutory Text*

Although retrospective review of regulations is designed to alleviate burdens on regulated actors, legal stability can also be beneficial to markets.[224] The recognition of these interests, defined as regulatory "entitlements," developed as public administrative law began to eclipse private common law over the course of the twentieth century.[225] Legal entitlements were generally considered lesser than legal rights, but more worthy of defense than legal privileges.[226] Courts, in granting legal protection to these artificial benefits, incentivized entrenched interests to strenuously defend their entitlements.[227] Simply put, interested parties rationally rely upon the private ordering that develops around existing regulation.[228] Yet all good things must come to an end—or at least will probably need some revision over time.[229]

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[222] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 34–35 (2008) (discussing status quo bias: the "general tendency to stick with [one's] current situation").

[223] *See* Wagner et al., *supra* note 2, at 185–86.

[224] *See* Margo Oge, *Memo to the Auto Industry: Time to Join California and Leaders Opposing Trump Clean Cars Rollback*, FORBES (July 29, 2019), https://www.forbes.com/sites/energyinnovation/2019/07/29/memo-to-the-auto-industry-time-to-join-california-and-leaders-opposing-trump-clean-cars-rollback/#463e4d7c4515 [https://perma.cc/X6MM-R4AK].

[225] *See, e.g.*, Sunstein, *Factions*, *supra* note 48, at 278–79; Wood et al., *supra* note 144, at 459.

[226] *See* Wood et al., *supra* note 144, at 459.

[227] *See id.* at 461–62 (footnote omitted) ("[F]ederal common law, statutory interpretation, and constitutional doctrines have been worked . . . to turn regulatory protections into an entitlement enforceable by the courts. [These entitlements] are statutorily-based, and the beneficiaries of these entitlements are not restricted to regulatees.").

[228] *See* Sunstein, *Deregulation*, *supra* note 36, at 204.

[229] *See, e.g.*, Sunstein, *Lookback*, *supra* note 24, at 590. A driving force behind the emphasis on retrospective review in the Obama administration was the realization that "'most regulations are subject to a cost-benefit analysis only in advance of their implementation,'" yet this is the time when agencies know the least about the rule's effect—causing agencies to make "'potentially controversial assumptions.'" *Id.* As Judge Frank Easterbrook has recognized, if a governing body doesn't "choose the optimal rule to start

In shifting from private-based public law to independent public law, courts have had to reconsider what constitutes a judicially reviewable dispute.[230] As a result of this shift, courts now focus on the "interest associated with a statute, rather than a traditional private right, . . . as the basis for invoking judicial relief."[231] Under this understanding, the highest priority for any court is the statute itself—and the entitlements that stem from rules authorized by it.[232] Indeed, as noted by Professor Sunstein in his Article, *Deregulation and the Hard-Look Doctrine*, "it is no longer feasible to understand the exclusive, or even the primary, judicial role as the promotion of private ordering. The role is instead to ensure that administrative agencies develop and implement the relevant public values—*often authoritatively reflected in the will of Congress* . . . ."[233] Thus, under this dynamic, the highest good in judicial review of agency action must be the statutory combination of the governing substantive statute and APA.[234]

The broader shift from private to public law features prominently in *State Farm*'s hard look review. In *State Farm*, the Supreme Court adopted the independent public law values that had been percolating from the District of Columbia Circuit.[235] Rationalizing *State Farm*, Professor Sunstein argues that the APA's judicial oversight function was intended to be extensive, in order to provide legitimacy to administrative decision making, compared to administrative norms prior to the adoption of the APA.[236] According to Professor Sunstein, it is this scrutinizing "mood,"[237] rather than the APA's text

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with," it must "be prepared to deal with the adaptations." Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14 (1984).

[230] *See* Sunstein, *Deregulation*, *supra* note 36, at 179–89 (outlining the shift taking place in administrative law at the time of *State Farm*, from private-based public law to independent public law).

[231] *See id.* at 180. Professor Sunstein states that hard look review is designed to "identif[y] goals in a way that conforms to the governing statute," thus recognizing that the governing statute should be judicial review's loadstar under independent public law. *Id.* at 210.

[232] *See* Wood et al., *supra* note 144, at 462; *see also* Walters, *supra* note 138, at 57–58 (recognizing that the modern model for administrative law is "built around the supremacy of statutory law" and that "the purpose of administrative law is to facilitate the full implementation of Congress's law and to properly incentivize Congress to use its legislative power").

[233] Sunstein, *Deregulation*, *supra* note 36, at 203 (emphasis added).

[234] *See id.* at 212.

[235] *See id.* at 196.

[236] *See id*. at 198–200. *But see* Seidenfeld, *Deossification*, *supra* note 133, at 484 (Under the APA, "notice and comment rulemaking was meant to allow an agency to adopt rules quickly and easily").

[237] *See* Sunstein, *Deregulation*, *supra* note 36, at 200. In distinguishing the APA from the then-prevalent standard of review, rational basis review, hard look review can be seen, according to Professor Sunstein, as effectuating the purpose of the APA: "to increase judicial supervisory power." *Id.*

itself, that justifies the emergence of hard look review.[238] But then, moving back to the text, he notes that "[t]he APA itself defines rulemaking, which is generally reviewable, as 'agency process for formulating, amending or repealing a rule,'"[239] thus warranting no special deference to cases of deregulation.[240]

Yet while this scrutinizing review may be justified under typical substantive legislation—which lacks provisions addressing regulatory review[241]—this is not the case for formal retrospective review statutes.[242] Indeed, if ever there was an argument that warranted a more deferential standard of deregulatory judicial review, formal retrospective review was tailor-made to make it.

2. *In Formal Retrospective Review, Special Deference to Deregulation Is Warranted Under the Governing Substantive Statute's Text*

What separates formal retrospective review from informal retrospective review is a statutory mandate.[243] As shown in Part IV.B, under the current understanding of formal retrospective review, this mandate can at times be burdensome and unhelpful to agencies.[244] But despite concerns over resource allocation, the micromanaging of agencies via formal retrospective review does come paired with the authority of the will of Congress—here, to "repeal or modify any regulation [the FCC] determines to be no longer in the public interest."[245] It is the "mood"[246] of the substantive formal retrospective review statute that should give courts pause before they turn to the APA or administrative common law and apply hard look review in these challenges.

Though administrative agencies have a duty to *reason* their actions under the arbitrary and capricious standard, they do not have a duty to *convert* judges to their rationale.[247] Courts in administrative disputes are designed to set a low

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[238] *See id.* at 210 ("The APA provides no clear authorization for the hard-look doctrine, which might therefore be regarded as a creation of federal common law.").

[239] *Id.* at 202.

[240] *See id.* at 196; *cf. supra* Part IV.A.1.

[241] *See* Wagner et al., *supra* note 2, at 188 (comparing informal review to the "'formal' reviews required by statute or executive order").

[242] *Cf.* Sunstein, *Deregulation*, *supra* note 36, at 205 ("The ordinary way to tell the difference [between permissible and impermissible bases for decisions to deregulate] is to look at the governing substantive statute.").

[243] Wagner et al., *supra* note 2, at 188.

[244] *See supra* notes 192–217 and accompanying text.

[245] Telecommunications Act of 1996, Pub. L. No. 104–104, § 202(h), 110 Stat. 56, 112 (1996).

[246] *See* Sunstein, *Deregulation*, *supra* note 36, at 200.

[247] *Compare* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105 (1983) ("Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made."), *with* Prometheus Radio Project v. FCC (*Prometheus IV*), 939 F.3d 567, 587 (3d Cir. 2019) ("The Commission might well be within its rights to adopt a new deregulatory framework . . . if it gave a meaningful evaluation of that effect and then explained why it believed the trade-off was justified for other policy reasons. . . . But based on the evidence

bar[248]—merely to ensure that agencies are not "depart[ing] from a prior policy sub silentio or simply disregard[ing] rules that are still on the books."[249] And in the deregulatory formal retrospective review context, courts have an even more limited role: simply ensuring the agency is following its statutory directives. This is because, as the Supreme Court recognized in *Baltimore Gas*, "[resolving] fundamental policy questions lies . . . with Congress and the agencies to which Congress has delegated authority . . . Congress has assigned the courts only the *limited, albeit important, task* of reviewing agency action *to determine whether the agency conformed with controlling statutes*."[250] In *Prometheus* and challenges under formal retrospective review statutes, that substantive policy decision—deregulation—was made when text of the statute was adopted by Congress;[251] it is not for courts to second-guess.[252]

In the case of the Quadrennial Review, Congress left courts little room for doubt. First, the FCC has forbearance authority: an explicit grant of power to "forbear from applying any regulation or any provision . . . if the Commission determines that . . . forbearance from applying such provision or regulation is consistent with the *public interest*."[253] Second, the FCC has authority to "repeal or modify any regulation it determines to be no longer in the *public interest*."[254] Deciding what best serves the "public interest" has long been a policy choice for *agencies* to make.[255] Yet despite this extensive statutory authorization, the FCC has still struggled to enact its desired reforms, in large part due to unjustified hard look review.[256] The judicial application of hard look arbitrary and capricious review in the formal retrospective review context indicates that

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and reasoning the Commission has given us, we simply cannot say one way or the other. This violated the Commission's obligations under the APA . . . ."), *cert. granted*, No. 19–1231, 2020 WL 5847134 (U.S. Oct. 2, 2020).

[248] *See* Gersen & Vermeule, *supra* note 19, at 1358 ("What is excluded by the arbitrary and capricious standard is genuinely ungrounded agency decisionmaking, in the sense that the agency cannot justify its action even as a response to the limits of reason.").

[249] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[250] *Balt. Gas & Elec. Co.*, 462 U.S. at 97 (emphasis added).

[251] *See* Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, 56 (1996) (The Telecommunications Act of 1996 was adopted to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers").

[252] *Cf.* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 523–24 (1978) (The Court held that § 553 of the Administrative Procedure Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights . . . but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.") (citation omitted).

[253] 47 U.S.C. § 160(a) (2012) (emphasis added).

[254] Telecommunications Act of 1996 § 202(h) (emphasis added).

[255] *See supra* Part IV.A.3.

[256] *See supra* Part III.

judges have centered their analyses on the administrative common law of the APA[257]—at the expense of substantive governing statutes' legislative text.

Congress can clear up this judicial bottleneck by amending the APA to add a thin rationality standard of review for static or deregulatory formal retrospective review actions—or courts can yield common law hard look review on their own. Either way, in giving primacy to the specific governing statute, not the APA or federal common law, judges in formal retrospective review cases, such as *Prometheus I*, *II*, *III*, or *IV*, will effectuate the will of Congress as it spoke to the substantive issue. In *Prometheus*, looking to the text of the Telecommunications Act of 1996 unambiguously reveals Congress's directive for the FCC "*to promote competition and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers . . . ."[258] In short, it is difficult to rationalize how this now seventeen-year back-and-forth comports with substantive statutory fidelity.

As Sir Isaac Newton recognized centuries ago, objects in motion will stay in motion, unless acted upon by an outside force.[259] Newton's First Law of Motion can inform understanding of hard look review, as evidenced by the modern trend in federal rulemaking.[260] In this sense, hard look review has acted as a force field, repelling deregulatory forces that would counteract expanding federal rulebooks. As Professor Sunstein has shown, this regulatory *stare decisis* can be justified as part of the judicial duty when statutes do not speak to the retrospective review process.[261] But when statutes *do* speak to this process, under the force of the will of Congress, regulatory inertia must give way.[262]

V. CONCLUSION

The FCC's Quadrennial Review and *Prometheus I*, *II*, *III*, and *IV* are prime examples of the glut of litigation that formal retrospective review requirements, under current standards of review, can create. By continuing with courts' unjustified hard look standard of review and short review cycles, this trend will likely continue. Thus, before passing formal retrospective review requirements,

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[257] *See* Sunstein, *Deregulation*, *supra* note 36, at 200 ("If the 'arbitrary and capricious' approach is taken to be highly deferential, one of the dominant purposes of the APA—to increase judicial supervisory power—would be frustrated by a shift to rulemaking and the rise of pre-enforcement review.").

[258] Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, 56 (1996) (emphasis added).

[259] *See* Carol Hodanbosi, *The First and Second Laws of Motion*, NAT'L AERONAUTICS & SPACE ADMIN. (Aug. 1996), https://www.grc.nasa.gov/www/k-12/WindTunnel/Activities/first2nd_lawsf_motion.html [https://perma.cc/3M7E-U9R4].

[260] *See* Walker, *Restoring*, *supra* note 11, at 1101–02 (noting that over 2015 and 2016, federal agencies added roughly 175,000 pages of rules to the *Federal Register*, while Congress added just 3,036 pages to the *Statutes at Large* over the same period).

[261] *See* Sunstein, *Deregulation*, *supra* note 36, at 204–05.

[262] *Id.* at 203 (The judicial role under public law is to "develop and implement the relevant public values—often authoritatively reflected in the will of Congress . . . ").

Congress should distinguish courts' standards of review: *State Farm*'s *hard look* arbitrary and capricious standard in pro-regulatory formal retrospective review actions and *Baltimore Gas*'s *thin rationality* arbitrary and capricious standard in deregulatory and static formal retrospective review actions. If courts are going to trust agency expertise in creating rules that bind the liberties of the public, sometimes based upon tangential statutory authority delegated decades prior,[263] it is only consistent to allow that same expertise to promote liberty by removing unnecessary regulatory burdens on the public. In short, "[i]t is not the role of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority."[264] It is regulatory humility from generalists that will allow President Roosevelt's technocratic vision to survive increasing political and judicial scrutiny—and help Americans flourish under an up-to-date regulatory system that reflects modern circumstances.

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[263] *See generally* Adler & Walker, *supra* note 10 (discussing the temporal complications of delegation).

[264] Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372, 435 (3d Cir. 2004) (Scirica, C.J., dissenting in part, concurring in part) (subsequent history omitted).